Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–28–01 OF 2015
VERNON ONG, ABDUL RAHMAN SEBLI JJCA AND HASNAH HASHIM J
21 DECEMBER 2015

Administrative Law — Judicial review — Application for — Review of decision taken to arrest and prosecute appellant for acting in contempt of a Federal Territory fatwa — Jurisdiction — Whether High Court had jurisdiction to review decision or actions of respondents — Whether High Court abdicated its supervisory jurisdiction — Exercise of administrative powers — Arrest and detention — Whether arrest and detention of appellant lawful — Whether arrest warrant null and void — Whether appellant produced before nearest judge of Syariah Court after arrested — Whether execution of arrest warrant illegal — Whether detention unlawful — Whether there was a violation of appellant's fundamental right to liberty of person under art 5(1) of the Federal Constitution — Whether fatwa binding on appellant — Whether respondents had right to prosecute appellant — Certiorari and mandamus — Whether order for certiorari and mandamus ought to be granted

On 26 March 2014, the appellant, a resident of the state of Kedah, was arrested by the Jabatan Agama Syarie Wilayah Perseketuan ('JAWI') at his residence in Kulim, Kedah and later detained in the Kulim Police Headquarters. The appellant was then transported in a van to Penang Airport to board a flight to LCCT Sepang, Selangor and thereafter taken to JAWI's office in Kuala Lumpur. The appellant was subjected to further questioning and interrogation by the JAWI officers in KL and then further confined in Rumah Kerajaan Jalan Duta. On 27 March 2014, the appellant was produced before a Syariah subordinate court to face two charges, namely one under s 7(b) and another under s 9 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('the Act'). The appellant was later released on bail. The appellant's solicitors had written to the Ketua Pendakwa Syarie Wilayah Persekutuan ('KPS') requesting to be provided with all cause papers, documents and information relating to the investigation, arrest and prosecution of the appellant. However, the KPS refused to furnish the requested information. The appellant filed a judicial review application against the Minister in charge of Islamic Religious Affairs ('the first respondent'), KPS, JAWI and the Government of Malaysia challenging the constitutionality of the actions and decisions of the

A respondents. The High Court judge dismissed the judicial review application on the principal ground that the appellant had failed to exhaust the remedy provided within the Syariah judicial system. This was the appellant's appeal against that decision. It was the appellant's case that the trial judge had wrongly abdicated the court's supervisory power over decisions of inferior courts such as
B the Syariah Court. The appellant further challenged the legality of his arrest and detention by the respondents.

Held, allowing the appeal with costs:

C (1) There was a line of settled authorities, which established the principle that the High Court had a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons, who carried out quasi-judicial functions or who were charged with the performance of public acts and duties. In this instance both the KPS and
D JAWI were public officers charged with the performance of public acts and duties under law. Further, the availability of other remedies could not bar a judicial review application on a complaint of error of law that went to the legality of the decision making. Thus, the trial judge had erred in abdicating the court's supervisory jurisdiction (see para 20).

E (2) In relation to the execution of the arrest warrant, the Form 3 of the Schedule of the Syariah CPC was altered to state that the appellant was required to be produced before JAWI's office at KL instead of the Syariah High Court/subordinate court. The implication was that if the arrested
F person was not brought to a Syariah Court in the first instance as required by law, the arrested person would have effectively been denied his immediate right to bail and to counsel. It was thus clear that the arrest warrant was defective for failure to comply with the mandatory requirements of s 32(1) which prescribed that every warrant of arrest shall
G be in Form 3 of the Schedule of the Syariah CPC. Accordingly, the arrest warrant was bad in law and therefore null and void (see paras 21–22).

(3) In this case, even though the appellant was arrested in Kedah he was not brought before the nearest Kadi as mandatorily required under s 36(1) of
H the Kedah Syariah CPC. Similarly, s 37 (1) of the FT Syariah CPC makes it mandatory for the respondents to produce the appellant before the nearest judge of a Syariah Court. Instead, the appellant was brought to Penang Airport to board a flight to Sepang and taken to JAWI's office in Kuala Lumpur. In fact, the appellant was only produced before a Syariah
I subordinate court on 27 March 2014. As such, the execution of the arrest warrant was illegal for being in violation of s 37(1) of the FT Syariah CPC and s 36(1) of the Kedah Syariah CPC (see paras 23–24).

(4) Based on the facts, the appellant's detention exceeded 24 hours and during the period of detention he was deprived of legal access. The

unlawful detention constituted a violation of the appellant's fundamental right to liberty of the person under art 5(1) of the Federal Constitution (see para 25).

(5) When s 9 of the Act was read together with s 34(3) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the AILA'), it was crystal clear that a *fatwa* or ruling under the AILA was only binding on a Muslim resident in the Federal Territories. In this case, it was an undisputed fact that the appellant was a resident of Kedah and not a resident of the Federal Territories. As such, he was not obliged to obey the *fatwa* in question. Thus the KPS had no right to prosecute the appellant and an order of certiotari was issued to quash any warrants of arrest imposed on the appellant with an order of mandamus to compel the KPS and JAWI to produce all cause papers, documents and information relating to the complaint against the appellant. In addition, the appellant was also entitled to damages for embarrassment, trauma, fear, loss and damage to reputation suffered by him due to the wrongful prosecution (see paras 26–29).

[Bahasa Malaysia summary

Pada 26 Mac 2014, perayu, seorang pemastautin di negeri Kedah, telah ditangkap oleh Jabatan Agama Syarie Wilayah Persekutuan ('JAWI') di kediamannya di Kulim, Kedah dan kemudian ditahan di Ibu Pejabat Polis Kulim. Perayu kemudian telah dibawa dalam van ke Lapangan Terbang Pulau Pinang untuk menaiki penerbangan ke LCCT Sepang, Selangor dan selepas itu dibawa ke pejabat JAWI di Kuala Lumpur. Perayu disoal dan disoal siasat selanjutnya oleh pegawai-pegawai JAWI di KL dan selepas itu ditahan di Rumah Kerajaan Jalan Duta. Pada 27 Mac 2014, perayu telah dihadapkan di hadapan mahkamah rendah Syariah untuk dua pertuduhan, iaitu satu di bawah s 7(b) dan satu lagi di bawah s 9 Akta Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1997 ('Akta tersebut'). Perayu kemudian telah dibebaaskan dengan ikat jamin. Peguamcara perayu telah menulis kepada Ketua Pendakwa Syarie Wilayah Persekutuan ('KPS') memohon dikemukakan semua kertas kausa, dokumen dan maklumat berkaitan siasatan, tangkapan dan pendakwaan perayu. Walau bagaimanapun, KPS enggan mengemukakan maklumat yang dipohon. Perayu telah memfailkan permohonan semakan kehakiman terhadap Menteri yang bertanggungjawab dalam urusan agama Islam ('responden pertama'), KPS, JAWI dan Kerajaan Malaysia dengan mencabar keperlembagaan tindakan dan keputusan responden-responden. Hakim Mahkamah Tinggi telah menolak permohonan semakan kehakiman itu atas alasan utama bahawa perayu telah gagal menggunakan remedi yang diperuntukkan dalam sistem kehakiman Syariah. Ini adalah rayuan perayu terhadap keputusan tersebut. Ia adalah kes perayu bahawa hakim perbicaraan telah tersalah melepaskan kuasa pengawalseliaan mahkamah berhubung keputusan mahkamah rendah seperti Mahkamah Syariah. Perayu selanjutnya

mencabar kesahihan penahanannya oleh responden.

Diputuskan, membenarkan rayuan dengan kos:

(1) Terdapat autoriti-autoriti yang telah ditetapkan, yang menentukan prinsip bahawa Mahkamah Tinggi mempunyai bidang kuasa kawal selia ke atas prosiding dan keputusan mahkamah rendah, tribunal dan badan atau orang lain, yang menjalankan fungsi *quasi* kehakiman atau yang dipertanggungjawabkan dengan pelaksanaan tindakan dan kewajipan awam. Dalam keadaan ini kedua-dua KPS dan JAWI merupakan pegawai-pegawai yang dipertanggungjawabkan dengan pelaksanaan tindakan dan kewajipan awam di bawah undang-undang. Selanjutnya, ketersediaan remedi lain tidak menghalang permohonan semakan kehakiman atas aduan kesilapan undang-undang yang membawa kepada kesahan membuat keputusan itu. Oleh itu, hakim perbicaraan telah terkhilaf dalam melepaskan bidang kuasa pengawalseliaan mahkamah (lihat perenggan 20).

(2) Berhubung pelaksanaan waran tangkapan, Borang 3 kepada Jadual CPC Syariah telah diubah untuk menyatakan bahawa perayu dikehendaki untuk dikemukakan di pejabat JAWI di KL dan bukan Mahkamah Tinggi/mahkamah rendah Syariah. Implikasinya adalah jika orang yang ditangkap tidak dibawah ke Mahkamah Syariah pada mulanya sepertimana dikehendaki oleh undang-undang, orang yang ditangkap itu secara berkesan telah menafikan hak terdekatnya untuk mengikat jamin dan untuk mendapat khidmat peguam. Oleh itu ia adalah jelas bahawa waran tangkapan itu adalah cacat kerana gagal mematuhi keperluan mandatori s 32(1) yang menetapkan bahawa setiap waran tangkapan hendaklah dalam Borang 3 kepada Jadual CPC Syariah. Oleh demikian, waran tangkapan itu adalah tidak baik dari segi undang-undang dan adalah terbatal dan tidak sah (lihat perenggan 21–22).

(3) Dalam kes ini, meskipun perayu telah ditangkap di Kedah dia tidak dibawa kepada Kadi yang terdekat sepertimana dikehendaki secara mandatori di bawah s 36(1) CPC Syariah Kedah. Begitu juga, s 37(1) CPC Syariah Wilayah Persekutuan menjadikannya mandatori untuk responden-responden mengemukakan perayu di hadapan hakim Mahkamah Syariah yang terdekat. Sebaliknya, perayu telah dibawa ke Lapangan Terbang Pulau Pinang untuk menaiki penerbangan ke Sepang dan dibawa ke pejabat JAWI di Kuala Lumpur. Bahkan, perayu hanya dikemukakan di hadapan mahkamah rendah Syariah pada 27 Mac 2014. Oleh itu, pelaksanaan waran tangkapan adalah menyalahi undang-undang kerana telah melanggar s 37(1) CPC Syariah Wilayah Persekutuan dan s 36(1) CPC Syariah Kedah (lihat perenggan 23–24).

(4) Berdasarkan fakta, penahanan perayu telah melebihi 24 jam dan sepanjang tempoh penahanan itu dia dinafikan daripada mendapat

khidmat peguam. Penahanan yang menyalahi undang-undang membentuk pelanggaran hak kebebasan asasi perayu di bawah perkara 5(1) Perlembagaan Persekutuan (lihat perenggan 25).

(5) Apabila s 9 Akta tersebut dibaca bersama s 34(3) Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('APUI'), ia adalah jelas bahawa satu *fatwa* atau peraturan di bawah APUI hanya terikat kepada seorang pemastautin Muslim di Wilayah Persekutuan. Dalam kes ini, ia fakta yang tidak dipertikaikan bahawa perayu merupakan pemastautin Kedah dan bukan pemastautin Wilayah-Wilayah Persekutuan. Oleh itu, dia tidak diwajibkan untuk mematuhi *fatwa* yang dipersoalkan. KPS dengan itu tiada hak untuk mendakwa perayu dan satu perintah certiorari telah dikeluarkan untuk membatalkan apa-apa waran tangkapan yang dikenakan ke atas perayu dengan satu perintah mandamus untuk mewajibkan KPS dan JAWI mengemukakan semua kertas kausa, dokumen dan maklumat berkaitan aduan terhadap perayu. Tambahan, perayu juga berhak mendapat ganti rugi kerana malu, trauma, ketakutan, kehilangan dan terjejas reputasi yang dialami olehnya akibat pendakwaan yang salah (lihat perenggan 26–29).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 312–381.

Cases referred to

Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor [2008] 3 MLJ 617; [2008] 4 CLJ 309, FC (refd)

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons [1976] 2 MLJ 156, FC (refd)

Dato Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232, FC (refd)

Dato' Abu Khalil Akasah v Nik Rahimah Wan Ahmad [2010] 1 CLJ (SYA) 20 (refd)

Government of Malaysia v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Ismail bin Mohamad v Wan Khairani bt Wan Mahmood & another appeal [2011] 1 MLJ 743, FC (refd)

Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors [2015] 3 MLJ 65, CA (refd)

Lai Cheng Chong v Sowaratnam [1983] 2 MLJ 113, FC (refd)

Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor [2014] 3 MLJ 74, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

A *Manoharan Malayalam & Anor v Dato' Seri Mohd Najib Tun Haji Abdul Razak & Ors* [2013] 2 MLJ 725; [2013] 8 CLJ 1010, CA (refd)
Public Prosecutor v Rajappan [1986] 1 MLJ 152, FC (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor
B [2011] 2 MLJ 457, FC (refd)
Siti Hasnah Vangarama Abdullah v Tun Dr Mahathir Mohamad (as the President of Perkim) & Ors [2012] 7 CLJ 845, CA (refd)
Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Ors
C [2013] 6 MLJ 646, CA (refd)
Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors [2009] 6 MLJ 863; [2009] 6 CLJ 683, CA (refd)

Legislation referred to

D Administration of Islamic Law (Federal Territories) Act 1993 ss 34, 34(3), 51, 53
Courts of Judicature Act 1964 Schedule, para 1
Criminal Procedure Code s 51A
Evidence Act 1950
E Federal Constitution arts 5(1), 5(3), 5(4)
Kedah Syariah Criminal Procedure Code s 36(1)
Kedah Syariah Criminal Procedure Enactment 1988 s 131
Lock-up Rules 1953 r 20
Specific Relief Act 1950 s 44(d)
F Syariah Court Evidence (Federal Territories) Act 1997 s 131
Syariah Criminal Offences (Federal Territories) Act 1997 ss 7, 7(b), 9
Syariah Criminal Procedure (Federal Territories) Act 1997 ss 22, 37, 37(1), 39, 104, Form 3, Schedule

G **Appeal from**: Application For Judicial Review No R2–25–119–06 of 2014 (High Court, Kuala Lumpur)

Rosli Dahlan (Bahari Yeow Tien Hong, Muhammad Faizal Faiz bin Mohd Hasani and Fawza Sabila bt Faudzi with him) (Lee Hishammuddin Alen & Gledhill) for the appellant.
H *Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

Vernon Ong JCA:

I INTRODUCTION

[1] The appellant's appeal is against the decision of the High Court dismissing the appellant's judicial review application on the constitutionality of the actions, decisions and omissions of the respondents.

[2] The appellant is a resident of the State of Kedah. **A**

[3] The first respondent is the Minister in the Prime Minister's Department in charge of Islamic Religious Affairs with jurisdiction over the third respondent Jabatan Agama Syarie Wilayah Persekutuan ('JAWI'). **B**

[4] The second respondent is the Chief Syarie Prosecutor ('KPS') of the Federal Territories ('FT') with powers to institute, conduct or discontinue any proceedings for a syariah offence before a Syariah Court in the FT. **C**

[5] In this judgment the first respondent shall be referred to as the Minister, the second respondent as KPS and the third respondent as JAWI.

THE SALIENT FACTS **D**

[6] On 25 March 2015, an arrest warrant was issued by the Syariah subordinate court in the FT against the appellant. The arrest warrant was subsequently endorsed by the Syariah High Court judge of Kedah.

[7] On 26 March 2014, at about 11:30am, enforcement officers of JAWI accompanied by the police arrived at the appellant's residence in Kulim, Kedah to execute the arrest warrant against the appellant. The JAWI officers proceeded to arrest the appellant and searched and examined the appellant's premises. At about 2pm, the appellant was taken to the Kulim Police Headquarters where the appellant was detained. **E** **F**

[8] At about 5:30pm, the JAWI officers transported the appellant in a van from the Kulim Police Headquarters to the Penang International Airport at Bayan Lepas, Pulau Pinang ('Penang Airport'). They arrived at the Penang Airport at about 10pm. **G**

[9] At about 11:30pm, the JAWI officers caused the appellant to board an AirAsia flight bound for the Low Cost Carrier Terminal ('LCCT') at Sepang, Selangor. The appellant arrived at LCCT Sepang on 27 March 2014 at 12:30am. **H**

[10] Subsequently, the appellant was taken to JAWI's office at Kompleks Pusat Islam, Jalan Perdana, Kuala Lumpur. The appellant was questioned and interrogated by the JAWI officers from about 1:30am – 3:30am. Thereafter, the appellant was taken to Rumah Kerajaan Jalan Duta where the appellant was further confined. **I**

[11] At about 7:40am, the appellant was taken from Rumah Kerajaan Jalan Duta to the Putrajaya Syariah Court Complex at the Palace of Justice, FT of Putrajaya ('Putrajaya Syariah Court'). At about 9am, the appellant was produced by the KPS before a Syariah subordinate court judge to face two charges; one under s 7(b) and another under s 9 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559'). The Syariah subordinate court granted bail of RM3,000 on each charge.

[12] At about 1:30pm the appellant was released after the terms of the bail had been satisfied.

[13] On 29 April 2014, the appellant's solicitors wrote to the KPS requesting to be provided with all cause papers, documents and information relating to the investigation, arrest and prosecution against the appellant in order to prepare for the appellant's defence.

[14] On 21 May 2014, the appellant's solicitors sent a reminder to the KPS for the documents and information.

[15] On 26 May 2014, the KPS replied stating his refusal to furnish the requested documents and information and that they have no intention to respond to the appellant's request in the following words — 'Pihak kami memang tidak berhasrat melayan surat tuan tersebut ...'.

JUDICIAL REVIEW APPLICATION

[16] The judicial review application is for a declaration and a certiorari to quash (i) the decisions, actions and/or omissions of JAWI with respect to the raid, search of the appellant's house and arrest, detention and removal of the appellant from Kedah to FT, (ii) the action and decision of the KPS to prosecute the appellant and in refusing to provide the documents to the appellant, and (iii) the omission of the Minister to intervene and discharge his duties consistent with the Federal Constitution.

FINDINGS OF THE HIGH COURT

[17] In essence, the decision of the learned judge in dismissing the judicial review application is predicated on the principal ground that the appellant had failed to exhaust the remedy provided within the Syariah judicial system which allows the appellant to seek remedy either in the Syariah Court where he was charged or the Syariah Appeal Court exercising the supervisory and revisionary powers.

SUBMISSION OF PARTIES

[18] The submission of learned counsel for the appellant is mounted on the following planks:

Jurisdiction

(a) once the learned judge accepts that it has jurisdiction, it cannot then abdicate its supervisory powers under judicial review on the grounds that this matter falls under the purview of the Syariah Court or that it could be raised within the Syariah judicial system. Issues of state enactments especially on Islamic law cannot oust the jurisdiction of the civil courts (*Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863; [2009] 6 CLJ 683 (CA); *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617; [2008] 4 CLJ 309 (FC); *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Ors* [2013] 6 MLJ 646 (CA); *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65 (CA); *Siti Hasnah Vangarama Abdullah v Tun Dr Mahathir Mohamad (as the President of Perkim) & Ors* [2012] 7 CLJ 845 (CA); *Ismail bin Mohamad v Wan Khairani bt Wan Mahmood & another appeal* [2011] 1 MLJ 743 (FC); *Manoharan Malayalam & Anor v Dato' Seri Mohd Najib Tun Haji Abdul Razak & Ors* [2013] 2 MLJ 725; [2013] 8 CLJ 1010 (CA)). The pith and substance of the complaint must be looked into, not so much whether the civil courts have the correct and applicable remedy (*Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor* [2014] 3 MLJ 74 (CA));

(b) the availability of other remedies cannot bar a judicial review application on a complaint of error of law that goes to the legality of the decision-making (*Government of Malaysia v Jagdis Singh* [1987] 2 MLJ 185 (SC); *Lai Cheng Chong v Sowaratnam* [1983] 2 MLJ 113 (FC); *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 (FC));

(c) the learned judge wrongly abdicated the court's supervisory power to the Syariah Court by misconstruing that there is relief available under ss 51 and 53 of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') when in fact there is none. The revisionary and supervisory powers under ss 51 and 53 of Act 505 are limited to provide judicial supervision over decisions made by Syariah subordinate court and does not extend to wrongful and illegal acts by public authorities like JAWI and the KPS (*Dato' Abu Khalil Akasah v Nik Rahimah Wan Ahmad* [2010] 1 CLJ (SYA) 20). The Syariah court is incapable of

granting the specific and adequate legal remedies provided under para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA 1964') and s 44(d) of the Specific Relief Act 1950 ('the SRA 1950');

Illegality — arrest warrant, arrest and detention

(d) the arrest warrant is defective because it does not comply with the formal requirements of ss 37(1) and 39 and Form 3 in the Schedule of the Syariah Criminal Procedure (Federal Territories) Act 1997 ('the FT Syariah CPC'). The prescribed words in the arrest warrant in Form 3 requiring the appellant to be produced before the Syariah High Court/Syariah subordinate court ('... ke hadapan Mahkamah Tinggi Syariah/Mahkamah Rendah Syariah ...') have been substituted with '... ke hadapan Bahagian Penguatkuasa Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur ...'. As such, the arrest warrant is illegal, null and void;

(e) after arresting the appellant at his residence in Kulim, Kedah the JAWI officers failed to produce the appellant before the nearest Kadi or judge of a Syariah subordinate court in Kedah. Instead, they brought the appellant to the Kulim Police headquarters and thereafter transported the appellant in a van to Penang Airport to board a flight to LCCT Sepang, Selangor. This omission by the JAWI officers is in violation of the mandatory requirement of s 37 of the FT Syariah CPC which provides the person arrested shall be brought before the nearest judge of a Syariah subordinate court. Further, as religious law is state law, the JAWI officers must also comply with the relevant laws of Kedah state where the arrest warrant was executed. As such, the JAWI officers have also violated a similar mandatory requirement under s 36(1) of the Kedah Syariah Criminal Procedure Enactment 1988 ('the Kedah Syariah CPC'). Consequently, the arrest of the appellant constitutes an abuse and illegality which is not curable;

(f) the appellant's detention from 11:30am on 26 March 2014 until he was released on bail at 1:30pm on 27 March 2014 was also illegal because it exceeded 24 hours before the appellant was produced before the Syariah subordinate court judge at Putrajaya as provided under art 5(4) of the Federal Constitution and s 22 of the FT Syariah CPC. The power to detain must be construed strictly and in cases of doubt or ambiguity the court should lean in favour of the subject (*Andrew s/o Thamboosamy v Superintendent of Pudu Prisons* [1976] 2 MLJ 156 (FC)). Further, the JAWI officers without due care, caution and responsibility interrogated and examined the appellant on the night of 26 March 2014 until 3:30am of the following day. This is in breach of Rule 20 of the Lock-Up Rules 1953 which provides that prisoners shall be locked up for the night by 6:30am and shall rise and be dressed by 6:30am. The Federal

Court held that a statement recorded after a prolonged period of interrogation at extremely odd hours going into the early hours of the morning in breach of the Lock-Up Rules is involuntary and therefore inadmissible (*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC));

(g) the JAWI officers did not inform the appellant of his right to counsel and also deprived and denied right to counsel from the point of his arrest to his production before the Syariah subordinate court at Putrajaya on 27 March 2014. The appellant was not represented and thereby deprived of access to legal counsel during the period of his illegal detention in breach of the appellant's right to counsel under art 5(3) of the Federal Constitution and s 104 of the FT Syariah CPC; and

Charge under s 9 of Act 559 invalid

(h) the charge preferred against the appellant under s 9 of Act 559 relates to the offence of the appellant acting in contempt of an FT *fatwa*; whereas such an FT *fatwa* is made under s 34 of Act 505 which prescribes that an FT *fatwa* shall only be applicable to a resident of the FT. The appellant is not a Muslim resident of the FT but is in fact a Muslim resident of Kedah. The Kedah Syariah Criminal Code does not criminalise a failure to obey a Kedah *fatwa*. In addition, there is no equivalent of s 9 of Act 559 under the Kedah Syariah Criminal Code. Similarly, there is no equivalent of the FT *fatwa* (PU(B) 51 Jil 40 No 3) dated 8 February 1996 in the state of Kedah. Therefore, the FT *fatwa* cannot be applied to the appellant who is a resident of Kedah. As such, the KPS had exercised his prosecutorial powers illegally by preferring a charge which is a non-offence against the appellant (*Public Prosecutor v Rajappan* [1986] 1 MLJ 152 (FC)).

[19] In reply, learned senior federal counsel ('SFC') for the respondents advanced the following main points:

(a) the arrest warrant is not invalid or illegal even though it is not according to the prescribed form;

(b) the arrest warrant was duly endorsed by a judge of the Kedah Syariah High Court before it was executed in Kulim, Kedah;

(c) the arrest and detention of the appellant was lawful as the appellant was arrested by the officers of the Jabatan Agama Islam Kedah ('JAIK') and not by JAWI officers;

(d) the appellant was produced before the Syariah Subordiante Court at Putrajaya within 24 hours;

(e) the appellant was only produced before the Syariah subordinate court for purposes of bail. He was subsequently charged in the Syariah High Court;

(f) the respondents were entitled to refuse to produce the documents as the appellant's counsel was only appointed after the filing of the wakalaf. Further, s 51A of the Criminal Procedure Code does not apply because s 131 of the Syariah Court Evidence (Federal Territories) Act 1997 ('Act 561') excludes the application of the Evidence Act 1950; and

(g) as an alternative remedy is available to the appellant, a declaration would only be granted in exceptional circumstances (*Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457 (FC));

OUR DECISION

[20] In essence, the appellant's complaints relates to five main questions. The first relates to the question of *whether the High Court has the jurisdiction to review the decision, actions and or omissions of the respondents*. There is a line of settled authorities which established the principle that the High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. In this instance, both the second and third respondents are public officers who are charged with the performance of public acts and duties under law, to wit, the various Syariah related Enactments and Acts. In fact, on 24 July 2014 the Court of Appeal had allowed the appellant's appeal against the High Court decision which dismissed the appellant's leave application on the grounds of lack of jurisdiction. We also agree with learned counsel for the appellant that the availability of other remedies cannot bar a judicial review application on a complaint of error of law that goes to the legality of the decision-making. In our view, the learned judge erred in abdicating the court's supervisory jurisdiction.

[21] The second question relates to the *execution of the arrest warrant*. On a careful perusal of the arrest warrant in question, we find that the prescribed words in Form 3 in the main body and indorsement which should read as 'ke hadapan Mahkamah Tinggi Syariah/Mahkamah Rendah Syariah di ...' have been substituted with the words 'ke Bahagian Penguatkuasa Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur'. In other words, the arrest warrant in question required the appellant to be produced before JAWI's office at Kuala Lumpur instead of the Syariah High Court/Syariah Subordinate. In our view, the alteration to the arrest warrant is significant because it departs fundamentally from the prescribed Form 3 which requires an arrested person to be brought before a syariah court and not to any other place, be it JAWI's

office. The implication is that if the arrested person is not brought to a syariah court in the first instance as required by law, the arrested person would have effectively denied his immediate right to bail and to counsel.

[22] It is thus clear that the arrest warrant is defective for failure to comply with the mandatory requirements of s 32(1) which prescribes that every warrant of arrest *shall* be in Form 3 of the Schedule of the Syariah CPC. Accordingly, we are constrained to hold that the arrest warrant is bad in law and therefore null and void.

[23] The third question relates to the question of *whether after the appellant was arrested the respondents ought to have brought the appellant before the nearest Kadi.* In this instance, even though the appellant was arrested in Kedah he was not brought before the nearest Kadi as mandatorily required under s 36(1) of the Kedah Syariah CPC. Similarly, s 37(1) of FT Syariah CPC makes it mandatory for the respondents to produce the appellant before the nearest Judge of a Syariah subordinate court once a warrant of arrest is executed.

[24] It is not disputed that the appellant was never brought before a Kadi in Kedah. Instead, he was taken to Penang Airport to board a flight to LCCT Sepang and thereafter taken to JAWI's office in Kuala Lumpur. The appellant was only produced before a Syariah subordinate court at 9am on 27 March 2014. On the undisputed facts, we hold that the execution of the arrest warrant to be illegal for being in violation of s 37(1) of the FT Syariah CPC and s 36(1) of the Kedah Syariah CPC.

[25] The third question is related to the fourth question on *whether the appellant's rights under arts 5(3) and 5(4) of the Federal Constitution were violated as a result of the appellant being detained for more than 24 hours and being deprived of legal representation*? On the facts as disclosed in the appellant's affidavit evidence which were unrebutted, the appellant's detention commenced at 11:30am on 26 March 2014 until he was released on bail at 1:30 pm on 27 March 2014; altogether, the appellant's detention exceeded 24 hours and during the period of detention the appellant was deprived of legal access to counsel. We agree with the submission of learned counsel that the appellant's rights under art 5(3) to consult and be defended by a legal practitioner of his choice and under art 5(4) for unlawful detention have been violated. We would also add that in the light of our decision on the second and third issue above, the detention of the appellant was unlawful and in violation of the appellant's fundamental right to liberty of the person under art 5(1) which stipulates that no person shall be deprived on his life or personal liberty save in accordance with law.

[26] The fifth and last question relates to the KPS' decision to prefer two

charges against the appellant under ss 7 and 9 of Act 559. According to the charge under s 9 of Act 559 the appellant is said to have disobeyed ('mengingkari') the orders or directions of Fatwa Wilayah-Wilayah Persekutuan (PU(B) 51 Jil 40 No 3) dated 8 February 1996.

[27] In our view, s 9 of Act 559 should be read together with s 34(3) of Act 505 which provides that a *fatwa* or ruling shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion. In other words, it is crystal clear that a *fatwa* or ruling made under Act 505 is only binding on a Muslim resident in the Federal territories.

[28] In this instance, the fact that the appellant is a resident of Kedah and not a resident of the Federal Territories is not disputed. Clearly, the appellant being not a resident of the Federal Territories is not obliged to obey the *fatwa* in question. We agree with the submission of learned counsel for the appellant that the decision to charge the appellant under s 9 of Act 559 when read together with s 34(3) of Act 505 does not enable the KPS to prosecute the appellant as it is a non-offence for the obvious fact that the appellant is not a resident of the Federal Territories.

[29] For the foregoing reasons the appeal is allowed with costs. The decision of the High Court is set aside. We grant the following prayers of the application:

> (3) An Order of Certiorari to quash any warrants of arrest, search warrants, warrants of seizure, security bonds, bonds and bail bonds whatsoever imposed on the applicant in violation of the provisions of the Syariah Criminal Procedure (Federal Territories) Act 1997 and the Syariah Criminal Procedure (Kedah Darul Aman) Enactment 1988;
>
> (4) An order of certiorari to quash the action and decision of the second respondent in prosecuting the applicant on 27 March 2014 and on 6 May 2014 for the charge of alleged offences under s 9 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Federal Territories Syariah Offences Act');
>
> (6) An Order of Mandamus to compel the second and third respondents to produce the following papers, documents and information:
>
> (a) the complaint against the Applicant;
>
> (b) ~~the investigation of the complaint against the applicant under s 7(b) of the Syariah Criminal Procedure (Federal Territories) Act 1997 ('Federal Territories Syariah Procedure Act');~~
>
> (c) ~~the written information relating to the investigation of the applicant under s 54 of the Federal Territories Syariah Procedure Act;~~
>
> (d) the Religious Enforcement Officer's Report under s 66 of the Federal Territories Syariah Procedure Act;

(e) the search warrant and/or warrant of arrest issued against the applicant, if any, under s 7(b) and s 7(c) of the Federal Territories Syariah Procedure Act;

(f) the search warrant and/or warrant of arrest issued against the applicant, if any, under s 8(b) and s 7(c) of the Syariah Court (Kedah Darul Aman) Enactment 2008;

(g) ~~all papers including correspondence between JAWI's officers and the Jabatan Hal Ehwal Agama Islam Kedah ('JHEAIK') relating to the raid and arrest of the applicant at his house in Kulim Kedah;~~

(h) the police report on the arrest of the applicant;

(i) the security bond under s 33 and/or s 40 of the Federal Territories Syariah Procedure Act;

(j) any order by the Syarie Lower Court Judge in Kulim, Kedah under s 37 of the Federal Territories Syariah Procedure Act;

(k) the applicant's flight tickets for the journey from the Pulau Pinang Airport to LCCT Sepang;

(l) any investigation statement recorded from the applicant whether in Kulim Kedah, Pulau Pinang or in any area in the Federal Territoties;

(m) any caution statement recorded from the applicant under the Criminal Procedure Code or under any provision of law and all documents which are mentioned/referred to in the said statements;

(n) the acknowledgement-receipt form for the list of items confiscated and seized ('Senarai Bongkar');

(o) photographs and video recordings especially relating to the raid, search, investigation, inspection and arrest against the applicant;

(p) ~~the investigation diary of proceedings of the enforcement officer relevant and related to the investigation against the applicant;~~

(q) a list of witnesses who will be called for the applicant's trial at the Syariah Court; and

(r) ~~every document which will be used in the applicant's trial at the Syariah Court.~~

(10) a declaration that the offence of disobeying a *fatwa* in force in the Federal Territories is only applicable to Muslim residents of the Federal Territories under s 9 of Act 559;

(15) that the costs of this application be borne by the respondents;

(16) Damages to be assessed based on the embarrassment, trauma, fear, loss, damage to reputation and goodwill suffered by the applicant due of JAWI's actions including the wrongful detention and arrest as well as the continuation of the wrongful prosecution against the applicant under s 9 of Act 559.

Appeal allowed with costs.

Reported by Kohila Nesan